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21 UNITED STATES DISTRICT COURT
22 SOUTHERN DISTRICT OF CALIFORNIA

23 **ViaSat, Inc.,**

24 *a Delaware corporation,*

25 Plaintiff

26 and Counter Defendant,

27 v.

28 **Acacia Communications, Inc.,**

a Delaware corporation,

Defendant

and Counter Claimant

Case No. 3:16-cv-00463-BEN-JMA

**DEFENDANT ACACIA
COMMUNICATIONS, INC.'S
OPPOSITION TO PLAINTIFF
VIASAT, INC.'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

REDACTED

Judge: Hon. Roger T. Benitez
Mag. Judge: Hon. Jan M. Adler

Date: March 5, 2018

Time: 10:30 a.m.

Courtroom: 5A

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I. INTRODUCTION

In 2009, Acacia hired ViaSat to make two components for an optical communications product Acacia was developing. Those two components were a DSP Core and an SDFEC Core. Under the Agreement, the parties agreed Acacia would buy the DSP Core for \$3.2 million, and would pay the cost of developing the SDFEC Core over time by giving ViaSat a royalty on each product Acacia sold that included **that specific** SDFEC Core. (D.I. 98, Ex. 22 (“Ag.”) §§ 2(b), 4); D.I. 75, Ex. 9).

To date, the arrangement has been profitable for ViaSat well beyond its expectations. Acacia has paid ViaSat a total of [REDACTED]. (D.I. 75, Mem. at 1-4). That figure is about [REDACTED]
[REDACTED]
[REDACTED]. (*Id.*). Thus, the decision to use the split fee-royalty arrangement gave ViaSat a massive windfall profit.

After the first product, it became clear to Acacia that ViaSat was not a viable long-term business partner. [REDACTED]
[REDACTED]. (*See* Ex. 115 at 158:16-19; Ex. 116 at 48:10-49:9). When their work together began, Acacia was a startup company with few employees. However, when Acacia turned to working on the next generations of products, Acacia had grown all of the in-house technical talent it needed to design its own products. Acacia has developed new products that are both commercially successful and that set the standard for optical communications.

ViaSat, on the other hand, has struggled in the optical communication business. ViaSat [REDACTED]
[REDACTED]. (Ex. 117 at VIASAT211203). At deposition, the head of ViaSat’s optical communications business [REDACTED]. (Ex. 118 at 158:2-165:19). But when he was asked about [REDACTED]
[REDACTED]. (Ex. 118 at 163:14-165:19).

1 Unbeknownst to Acacia until this lawsuit began, ViaSat had been [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]. (Ex. 119 ¶¶ 50, 77-83, 103-106, 126-128, 147-
 5 152, 175-185). [REDACTED].

6 Having failed to [REDACTED]
 7 [REDACTED], ViaSat resorted to suing Acacia. ViaSat's basis was that
 8 Acacia's new products included a backward-compatible mode that could interact with
 9 its first generation product. (*E.g.*, D.I. 98, Ex. 19). ViaSat assumed that the new
 10 products must have included the SDFEC Core. (*E.g., id.*). Acacia repeatedly told
 11 ViaSat that, no, the products did not have that SDFEC Core, but that Acacia instead
 12 had developed the products (including its own SDFEC core) independently. (D.I. 98,
 13 Exs. 20 & 21). ViaSat did not believe Acacia and filed this case.

14 During discovery, ViaSat finally learned that Acacia had been telling the truth:
 15 its new products did not incorporate ViaSat's SDFEC Core (the key portion of which
 16 – the decoder – was [REDACTED], so Acacia could not possibly have copied). So Acacia
 17 did not owe any royalty payments for the backward-compatible products. The
 18 Agreement's express terms provided for a royalty only when Acacia included the
 19 SDFEC Core on a product, but Acacia was not including the SDFEC Core on the
 20 Accused Products. That should have been the end of the case.

21 Unwilling to acknowledge the express terms of the Agreement barring its
 22 recovery, ViaSat chose instead to keep litigating, by adopting a strained reading of the
 23 Agreement under which, in essence, Acacia would be barred from competing with
 24 ViaSat. Instead of relying on its prior belief that Acacia was using the SDFEC Core
 25 that ViaSat had made, ViaSat shifted its posture to now claim that Acacia had made its
 26 own components using ViaSat's ideas. (*See, e.g.*, D.I. 98, Mem. at 23).

27 ViaSat still had a problem, however. The Agreement's express terms preclude
 28 ViaSat from pursuing claims based only on "use." [REDACTED]

1 [REDACTED].
 2 ViaSat's solution so far has been just to ignore the problematic contract
 3 language. Acacia filed a summary judgment motion on January 26, 2018, laying out the
 4 reasons it is not liable. (D.I. 83). Although ViaSat had that motion for a week before
 5 filing this motion, and this motion seeks the mirror-image result of Acacia's, ViaSat did
 6 not grapple with the issues that Acacia identified.

7 ViaSat's allegations rely principally on rhetoric and repeated references to
 8 "theft," "copying," "lying," and other such inflammatory terms to make up for its lack
 9 of substance. The Agreement does not provide ViaSat with any right to relief at all,
 10 and *a fortiori* not to summary judgment.

11 **II. SUMMARY OF THE ARGUMENT**

12 ViaSat's motion is short on applying the law and the parties' Agreement to the
 13 facts of this case. Instead, it tells a long tale of largely irrelevant and almost entirely
 14 contested facts, intersperses some incomplete statements about the parties'
 15 Agreement, and then concludes that Acacia somehow must have breached the contract
 16 and misappropriated ViaSat's Alleged Trade Secrets ("ATs"). A motion this devoid
 17 of analysis and application of law to facts cannot entitle ViaSat to summary judgment.
 18 *E.g., Sako v. Wells Fargo Bank, N.A.*, No. 14-1034, 2016 WL 110513, at *13 (S.D. Cal.
 19 Jan. 8, 2016) (denying summary judgment where plaintiff did not "present any
 20 evidence" of its claim "[b]esides a conclusory argument").

21 ViaSat's argument's greatest flaw lies in its re-casting of the Agreement. ViaSat
 22 tries to enforce a version of the Agreement that excludes language [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]. ViaSat's
 27 disappointment with the agreement it negotiated does not entitle it to block Acacia
 28 from making competing products or charge it more money, beyond the negotiated

1 sums, for doing so.

2 As discussed further below, none of the evidence that ViaSat identifies shows
3 breach of contract or misappropriation of trade secrets. In many instances, ViaSat
4 does not even explain why its evidence supposedly renders Acacia liable, and so Acacia
5 responds to every theory ViaSat actually asserts. (Absent any viable theory in its
6 opening motion, it would of course be improper for ViaSat to attempt to introduce
7 some new theory in its reply brief.)

8 **III. FACTUAL BACKGROUND**

9 **A. Acacia Hired ViaSat To Make Two Components of a Complex Product, and Acacia Paid ViaSat Well for the Technology.**

10 In 2009, Acacia hired ViaSat to assist with development of a new type of fiber
11 optics communication device called a Coherent Optical Receiver. That receiver is a
12 highly complex device. Acacia hired ViaSat to work on two specific parts of it: the
13 DSP Core and the SDFEC Core. (Ag., Preamble para. 3). A DSP Core performs
14 digital signal processing (DSP), which includes correcting for distortions in the optical
15 channel that can arise during transmission. (*See* D.I. 86, Mem. at 2). An SDFEC Core
16 performs soft decision forward error correction (SDFEC). (*See id.*).

17 After signing a Non-Disclosure Agreement (“NDA”), the parties spent the next
18 several months negotiating financial terms. As Acacia explained in earlier papers (D.I.
19 75), the highest price ViaSat ever quoted Acacia for [REDACTED]
20 [REDACTED]. (D.I. 75, Mem. at 3-4).

21 Ultimately, the parties agreed on a split payment, where the portion associated with the
22 DSP Core (\$3.2 million) was covered in up-front milestone payments called “NRE”
23 (non-recurring engineering) payments, while additional payment associated with the
24 SDFEC Core was covered by a per-unit royalty for products using that core. (*Id.*).

25 After settling on financial terms, the parties proceeded to sign an interim
26 agreement [REDACTED].

27 A particular focus of the negotiation was [REDACTED]
28 [REDACTED]. Early drafts defined “Licensed Products” (i.e. royalty-

bearing products) as [REDACTED] [REDACTED] [REDACTED] (D.I. 83, Mem. at 8; D.I. 83, Ex. 29). But Acacia felt that was overbroad and proposed that it be limited to products that “**incorporate** all or any part of the Licensed Materials,” which ViaSat accepted.¹ This change eliminated mere “use” of Licensed Materials as requiring a royalty. (D.I. 83, Mem. at 8).

Another area of negotiation concerned what the final agreement would permit Acacia to do with the Foreground Information that ViaSat assigned to Acacia for \$3.2 million, when that Foreground Information would be used in products that also used Background Information. Early drafts of the Agreement let Acacia [REDACTED]

[REDACTED]. (*Compare* D.I. 83, Ex. 34 § 3(b), *with* D.I. 83, Ex. 35 § 3(b)). Requiring Acacia to [REDACTED]

[REDACTED] makes no sense. So Acacia secured language that gave it a royalty-free license allowing it to use Background Information “in connection with ACACIA’s exploitation of the Foreground Information.” (Ag. § 3(b)).

These changes illustrate that the particular language of the Agreement matters, and that the parties’ rights and obligations cannot be generalized with abstract statements about what Acacia cannot “use.”

The parties signed the final Agreement in November 2009, and got to work.

B. ViaSat Breached the Agreement Almost Immediately.

But ViaSat did not even wait to be done with its work for Acacia before breaching the Agreement. ViaSat had agreed not to provide services related to the DSP Core technology it made for Acacia to companies in the 100G optical communications industry [REDACTED]. (Ag. § 4(c); Ex. 120). ViaSat publicly announced [REDACTED] (Ex.

¹ Emphasis is added and quotations and citations omitted, except as noted.

121). ViaSat stated that it was [REDACTED]
 [REDACTED] (*Id.*). One ViaSat
 engineer explained [REDACTED]
 [REDACTED] (*Id.*) – [REDACTED] (Ex. 122 at
 35:12-14, 96:18-98:24).

Acacia was worried that ViaSat would breach the Agreement. (Ex. 123 (“[REDACTED]
 [REDACTED]”). When Acacia [REDACTED]
 [REDACTED]. (Ex. 124). ViaSat assured Acacia that [REDACTED]
 [REDACTED]. *Id.*

Yet ViaSat still did not comply with Section 4(c). Later that year, ViaSat [REDACTED]
 [REDACTED]. (*See* D.I. 95, Ex.
 12 ¶ 34). [REDACTED]
 [REDACTED].
 (Ex. 119 ¶¶ 50, 186-87). As discussed in Section III.E below, [REDACTED]
 [REDACTED]. One could not ask for a clearer
 violation of Section 4(c), [REDACTED]. (*See, e.g.*, Ex. 125 at
 VIASAT247423 ([REDACTED])).

C. Acacia Has Long Since Moved On From ViaSat’s Old Technology.

Some of ViaSat’s SDFEC technology [REDACTED]
 [REDACTED]. (*See* D.I. 98, Exs. 27-30). [REDACTED]
 [REDACTED] (*See* D.I. 98, Ex. 3). Yet,
 as Acacia developed more advanced products, ViaSat’s technology [REDACTED].
 (*E.g.*, D.I. 98, Ex. 31). In later products (i.e., starting with Sky), Acacia [REDACTED]
 [REDACTED].

When designing the new products, Acacia initially thought that its customers
 would appreciate [REDACTED]. (*See, e.g.*, D.I.
 98, Ex. 32; Ex. 115 at 72:19-73:5; D.I. 83, Ex. 19 at 78:8-83:18). Acacia considered

whether [REDACTED]
 [REDACTED]. (D.I. 98, Ex. 32). But Acacia understood that, since it was making a new product, and not using ViaSat's SDFEC Core, Acacia would not owe ViaSat anything. (*Id.*).

Acacia did make backward-compatible products (i.e., Sky, Denali, and Meru, the "Accused Products"). However, compatibility with Everest ultimately proved unimportant, and Acacia decided [REDACTED]. (D.I. 83, Ex. 19 at 79:2-11; Ex. 126 at 118:12-25). Acacia's Chief Technology Officer explained [REDACTED]
 [REDACTED]. (Ex. 115 at 119:6-122:7). He also explained that the customers "will not value backward compatibility at all." (*Id.* at 121:12-122:7).

D. Acacia Gave ViaSat One More Chance To Make a Useable SDFEC, and ViaSat Failed.

[REDACTED]
 [REDACTED]
 [REDACTED]. (Ex. 127 at 55:18-22). Acacia gave ViaSat the chance to deliver an adequate proposal, while Acacia separately worked on its own independent design. (Ex. 128; Ex. 126 at 261:17-263:14).

Ultimately, [REDACTED]
 [REDACTED]
 [REDACTED]. (Ex. 129; Ex. 126 at 261:17-263:14). Since Acacia had the capacity to design its own, superior product, there was no point paying ViaSat a royalty for a new SDFEC Core [REDACTED]
 [REDACTED]. (*E.g.*, D.I. 98, Ex. 33). So Acacia proceeded with its own independent design.

E. ViaSat [REDACTED] and Now Hopes to Ride Acacia's Coattails.

[REDACTED]
 [REDACTED]
 [REDACTED]. (Ex. 117 at VIASAT211203; Ex. 118 at

1 156:20-158:7). [REDACTED]
 2 [REDACTED]
 3 [REDACTED]. (Ex. 117 at VIASAT211203; Ex. 118 at 160:14-19, 162:24-163:13).
 4 [REDACTED]
 5 [REDACTED].

6 Prakash Chitre, the head of ViaSat's optical communications business, [REDACTED]
 7 [REDACTED] [REDACTED]. (Ex. 118 at 163:14-165:19). He
 8 [REDACTED].” (*Id.*). When asked why ViaSat's work
 9 for Acacia succeeded, [REDACTED]
 10 [REDACTED]
 11 [REDACTED] (*Id.*).

12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]. (Ex. 119 ¶¶ 50, 77-83, 103-106, 126-128, 147-
 19 152, 175-185). [REDACTED]
 20 [REDACTED]. (See Ex. 130 at 148:22-150:20; 237:25-238:19; 241:24-243:9;
 21 247:18-248:11). [REDACTED]
 22 [REDACTED]. (D.I. 95,
 23 Ex. 12 (“Bersin Rep.”) ¶ 69; D.I. 95, Ex. 17 (“Prowse Rebuttal Rep.”) ¶¶ 27-54).

24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

[REDACTED]

(Ex. 131 at VIASAT101226).

[REDACTED]

(Ex. 132 at VIASAT169367). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]. ViaSat never asked for or received Acacia's permission.

ViaSat's misappropriation did not stop at [REDACTED]. ViaSat also filed several patent applications containing Acacia's trade secrets. (Ex. 119 at ¶¶49, 72-76, 102, 123-125, 145-146, 170-174). Acacia, as the true inventor, is seeking assignment of these applications and all resulting patents (D.I. 3, Ex. 1, Count I).

In sum, [REDACTED]

[REDACTED]. ViaSat [REDACTED]

[REDACTED]. And ViaSat did so without asking [REDACTED]

[REDACTED]

[REDACTED]. (D.I. 98, Mem. at 1, 3-4, 12, 14, 16-18).

F. ViaSat's Awareness That Acacia Has Not Breached the Agreement.

ViaSat's accusations over the years all focused on the incorrect assumption that Acacia could not make backward-compatible products without incorporating ViaSat's SDFEC Core. ViaSat's July 22, 2015 letter stated that "ViaSat cannot understand how the CFP Module might provide such backwards compatibility without containing some or all of the 'SDFEC Core.'" (D.I. 98, Ex. 19). ViaSat's January 21, 2016 complaint alleged that "[i]t would not be possible for Acacia to develop ... a CFP Module otherwise backwards compatible with other royalty-bearing modules, without incorporating ViaSat's SDFEC Core." (D.I. 1, Ex. 1 ¶ 16).

ViaSat may have been surprised to learn in discovery that Acacia had accomplished the [purportedly] impossible – it made a backward-compatible product that did not contain any SDFEC Core code (i.e., Licensed Materials). ViaSat's source code expert (Dr. Hassoun) spent [REDACTED] in Acacia's counsel's office examining Acacia's code and [REDACTED]. (D.I. 83, Ex. 26 at 52-154). Indeed, Acacia could not have copied such Licensed Materials because [REDACTED]. (See Ex. 133 at 88:15-97:23). Given the license Acacia has under Section 3(b) to use Background Information to make backward-compatible products (see D.I. 83, Mem. at 11-17), ViaSat should have dropped its case then.

Of course, ViaSat should not have been surprised, since Acacia has been explaining that all along. In response to ViaSat's July 22, 2015 letter (D.I. 98, Ex. 19), Acacia explained that "Acacia has independently developed its own distinct product. Acacia has every right under the Agreement to independently develop soft decision forward error correction technology." (D.I. 98, Ex. 20). Acacia further explains:

[Acacia] had independently developed its own distinct product, which incorporated its own independently developed soft decision forward error correction technology, and that such product did not contain or utilize the "SDFEC Core" referenced in the Agreement or any variant or derivative thereof. As such, Acacia also notified ViaSat that it had no obligation to pay royalties to ViaSat for its CFP Modules. ... Acacia did not have access to the details or coding of the SDFEC Core.

(D.I. 98, Ex. 21). These explanations were correct: Acacia “independently developed” the Accused Products, which do not “contain or utilize the ‘SDFEC Core’ referenced in the Agreement,” because it could not access the [REDACTED], and Acacia had “every right under the Agreement” to do so. ViaSat’s over-the-top claim that “Acacia lied” (D.I. 98, Mem. at 14) is as incorrect as it is improper.

Given Acacia’s repeated denials of wrongdoing, and its vigorous defense in this case, ViaSat’s suggestion that Acacia “Knows It Is Liable” is also baseless. (D.I. 98, Mem. at 21). The document that ViaSat cites is a budget worksheet that Acacia prepared for this litigation, to estimate what it would owe **if** the Accused Products were subject to the Agreement’s royalty requirements. (D.I. 98, Ex. 58).² ViaSat’s theory is that Acacia admitted liability because the document says [REDACTED] (D.I. 98, Mem. at 21). ViaSat thus resorts to mischaracterizing documents, ignoring the actual facts.

IV. ARGUMENT

A. ViaSat’s Interpretation Conflicts With the Agreement’s Language.

ViaSat’s summary of the Agreement glosses over key language that explains the parties’ rights. (Mem. at 9-12). The meaning of a contract is governed primarily by its terms. *See Reserves Mgmt., LLC v. Am. Acquisition Prop. I, LLC*, 86 A.3d 1119, 2014 WL 823407, at *5 (Del. 2014) (“This Court has stated that... contract terms themselves will be controlling when they establish the parties’ common meaning”). The Agreement creates three relevant types of information: Foreground Information, Background Information, and Licensed Materials.

1. Foreground Information

Foreground Information consists of two parts: (1) the digital signal processing-related technology that ViaSat would make for Acacia under the Agreement; and (2) the “DSP Core,” which is the “ASIC IP core for Digital Signal Processing” that ViaSat

² Acacia testified this document was created **after** ViaSat filed this suit, as the metadata confirms. (Ex. 126 at 141:6-17; D.I. 1, Ex. 1; Seventh Duncan Smith Dec. ¶ 26)

1 was to develop, and “all Deliverables relating” to the DSP Core. (Ag., Recitals ¶ 3, §
 2 1(j)). The DSP Core is an “IP core,” which is a term of art for source code controlling
 3 the function of a semiconductor. (Ex. 134 at 149:4-5). The “Deliverables relating” to
 4 the DSP Core includes, e.g., specifications. (Ag. §§ 1(d), 2(a); D.I. 83, Ex. 13 at 1).

5 In exchange for the \$3.2 million development fee, ViaSat agreed to several
 6 conditions related to Foreground Information. First, ViaSat expressly assigned to
 7 Acacia “all right, title and interest in and to all Foreground Information, including all
 8 Intellectual Property Rights therein and thereto.” (Ag. § 3(a)). Second, ViaSat granted
 9 Acacia a license to use any of the Background Information Acacia might need to fully
 10 exploit its own Foreground Information. (*Id.* § 3(b)). Third, ViaSat agreed not to
 11 compete with Acacia regarding Foreground Information in certain ways. (*Id.* § 4(c)).
 12 Notably, the Agreement does **not** provide ViaSat any right to use Foreground
 13 Information. (Ex. 135).

14 **2. Background Information and Licensed Materials**

15 Background Information also has two parts: (1) information that ViaSat
 16 “owned,” “licensed,” or “developed” “prior to” or “separate from” the Agreement, as
 17 specifically defined in the Agreement; and (2) the SDFEC Core. (*Id.* § 1(b)). The
 18 SDFEC Core is another “IP core.” (*Id.*, Recitals ¶ 3). Like Foreground Information,
 19 Background Information also includes “all ... related” documentation. (*Id.* § 1(b)).
 20 Thus, also like Foreground Information, Background Information includes a portion
 21 that predates the Agreement (e.g., prior information) and a portion that post-dates the
 22 Agreement (e.g., the SDFEC Core and new documentation).

23 The Agreement provides ViaSat certain rights with regard to Background
 24 Information. These rights include limiting Acacia’s ability to “decompile, reverse
 25 engineer, disassemble, or otherwise reduce” Background Information “to a human-
 26 perceivable form.” (*Id.* § 8(b)). ViaSat also has the right to limit Acacia’s ability to
 27 “modify or prepare derivative works” of Background Information. (*Id.*). The
 28 Agreement also states that Acacia will use Background Information “only as

authorized” by the Agreement, but the same clause cautions that the Agreement must not “be construed as conferring by implication, estoppel or otherwise upon either party any license or other right except the licenses and rights expressly granted in this Agreement.” (*Id.*). In other words, additional rights that are not specifically enumerated (like a general right to prevent “use”) are **not** implied. *Reserves Mgmt., LLC*, 86 A.3d 1119, 2014 WL 823407, at *5.

The Agreement also creates exceptions to ViaSat’s rights regarding Acacia’s use of Background Information. The first exception is the license in Section 3(b) regarding the use of Background Information with Foreground Information. (*Id.* § 3(b)). Acacia explained in D.I. 83 that this license allows Acacia to use Background Information to make backward-compatible products (i.e., to “fully ... exploit” the Foreground Information). (D.I. 83, Mem. at 11-17). This license makes sense, because the DSP Core technology and SDFEC Core technology are highly intertwined. (D.I. 83, Ex. 15 ¶¶ 51-54, 83; D.I. 83, Mem. at 14). Thus merely assigning Acacia the Foreground Information without also providing a way to use related Background Information would all but preclude Acacia from using its Foreground Information. (*See* D.I. 83, Ex. 15 ¶¶ 51, 55). Acacia paid \$3.2 million for “all right, title and interest in and to all Foreground Information,” so the Agreement should not, and does not, prevent Acacia from making the fullest commercial use of it.

The second exception to ViaSat’s rights regarding Acacia’s use of Background Information concerns the Licensed Materials. (Ag. § 4). Acacia explained in D.I. 83 that Licensed Materials are two specific categories of Background Information: the SDFEC Core made under the agreement (i.e., [REDACTED]) and related documentation. (D.I. 83, Mem. at 6). If Acacia makes a Licensed Product with Licensed Materials in the specific ways described by the Agreement, then Acacia owes ViaSat a per unit royalty. (Ag. § 4(b)). However, the Agreement requires that the Licensed Materials (i.e., [REDACTED]) be “incorporate[d]” into the integrated circuit for the integrated circuit to be a Licensed

1 Material. (Ag. § 1(l)). “[I]ncorporat[ing]” does not include merely “use” of the
 2 Licensed Materials to make another product. Early drafts of the Agreement [REDACTED]
 3 [REDACTED] [REDACTED] [REDACTED]
 4 [REDACTED] [REDACTED] [REDACTED]
 5 [REDACTED]. (D.I. 83, Mem. at 7-9). Hence, as with Background Information, the
 6 Agreement does not require a royalty for mere “use” of Licensed Materials.

7 ViaSat asserts that Acacia’s interpretation of Section 3(b) would “negate all of
 8 the above provisions restricting Acacia’s right to use the Everest SDFEC ‘solely’ for
 9 royalty-bearing products.” (D.I. 98, Mem. at 22-23). That is **not** Acacia’s position.
 10 Acacia agrees that when Licensed Materials are incorporated into a Licensed Product,
 11 then Acacia owes a royalty. When Acacia incorporated the SDFEC Core that ViaSat
 12 provided into its Everest and K2 products, it paid the royalty, and is still paying
 13 royalties for each such sale (despite ViaSat employing the proceeds as a war chest to
 14 attack Acacia, its customer, in this forum). (*See* D.I. 98, Ex. 3). But when using
 15 Background Information, including Licensed Materials, in a way that does **not** create a
 16 Licensed Product and **does** meet Section 3(b) (e.g., making a backward-compatible
 17 product), then Section 3(b)’s license exempts Acacia from Section 8(b), as it is **subject**
 18 **to** the other “licenses and rights expressly granted in this Agreement. (Ag., § 8(b)).

19 **3. ViaSat Aggrandizes Its Rights Under the Agreement.**

20 ViaSat cites Section 8(a) of the Agreement to claim that it “has exclusive
 21 ownership of the SDFEC Core.” (D.I. 98, Mem. at 10). Section 8(a) provides:

22 ACACIA acknowledges that all Intellectual Property Rights in the
 23 Background Information and the Licensed Materials are and will remain
 24 the sole property of VIASAT, including all modifications, improvements,
 25 and derivative works relating to the Background Information and the
 26 Licensed Materials, including but not limited to all modifications,
 27 improvements, and derivative works requested or suggested by ACACIA.

28 (Ag. § 8(a)). This clause does **not** have the express assignment language by which
 ViaSat assigned to Acacia all Foreground Information. (*Id.* § 3(a)). Rather, the
 Agreement merely “acknowledges” that the rights that ViaSat already had “are and will

1 remain” ViaSat’s rights. (Ag. § 8(a)). While Section 8(a) also refers to suggestions by
 2 Acacia, that concerns, at most, suggestions Acacia made prior to the Agreement and
 3 any assignment in prior agreements. Therefore, ViaSat does not exclusively own
 4 contributions that Acacia made to the SDFEC Core under the Agreement.

5 ViaSat’s rights to limit Acacia’s use of Background Information likewise reflect
 6 this balanced approach. Every right that ViaSat has regarding Acacia’s use of
 7 Background Information concerns only the Background Information that Acacia
 8 “receives from VIASAT under this Agreement.” (Ag. § 8(b)). By this express term,
 9 Background Information that Acacia provided ViaSat (e.g., improvements to the
 10 SDFEC Core) are not subject to Section 8(b). Likewise, Section 8(b) does not apply to
 11 Background Information that ViaSat provided prior to the Agreement.³ This too
 12 makes sense, because otherwise the Agreement would retroactively bind all of the
 13 parties’ prior, high-level discussions.

14 ViaSat claims far greater rights than the Agreement actually provides:

15 To summarize, the parties agreed that Acacia would not use any of the
 16 Everest SDFEC design, including any documentation thereof, regardless
 17 of whether it was initially provided by ViaSat or developed jointly
 18 between ViaSat and Acacia, except in royalty-bearing products. *Id.* at §
 19 4(a). Acacia also agreed not to use any information furnished by ViaSat
 20 prior to execution of the License Agreement (“Background
 21 Information”), except for the purpose of developing royalty-bearing
 22 products. *Id.* at § 8(b).

23 (D.I. 98, Mem. at 12). **None** of those statements is correct. Acacia did not agree not
 24 to “use” any Background Information under Section 8(b). Section 8(b) does not create
 25 a general “use” restriction, and certainly not one that overrides Section 3(b), nor for
 26 Background Information that was not provided by ViaSat under the Agreement.
 27 Acacia also did not agree not to “use” any SDFEC Core documentation under Section
 28 4(a). That section is expressly **subject to** Acacia’s other rights, which include Section
 3(b). As discussed above, [REDACTED]

³ There was a June 2009 NDA covering that time period.

1 [REDACTED]
 2 ViaSat's remaining arguments about a "use" restriction (D.I. 98, Mem. at 22) are
 3 wrong or irrelevant for many of the same reasons:

- 4 • ViaSat cites the last sentence of Section 4(a), but that sentence expressly
 5 recognizes that it does not apply where "ACACIA has entered into a separate
 6 written Agreement with VIASAT for such use." Section 3(b) is such an
 7 "Agreement." (*See* Ag., Preamble ¶ 4 (referring to each of the clauses as
 8 "Agreements")).
- 9 • ViaSat cites the definition of the "Permitted Use" (D.I. 98, Mem. at 22). Apart
 10 from defining it, the Agreement never uses that term.
- 11 • ViaSat cites the Section 4(b) requirement to pay a royalty fee (*id.*), but that is
 12 required only for Licensed Products incorporating Licensed Materials.
- 13 • ViaSat cites Section 8(a) (*id.*), but as discussed above, that does not assign
 14 anything new to ViaSat.
- 15 • ViaSat cites Section 8(b) (*id.*), but that is subject to Section 3(b).
- 16 • ViaSat cites the definition of Licensed Products (*id.*), but Acacia did not
 17 incorporate any Licensed Materials into the Accused Products. (D.I. 83, Mem.
 18 at 6-11).

19 For these reasons, and those discussed below, ViaSat does not have "[t]he only
 20 reasonable interpretation of the License Agreement" (D.I. 98, Mem. at 22), but instead
 21 an unreasonable one.

22 **B. ViaSat Misunderstands What Is Necessary**
 23 **for Backward-Compatible Products.**

24 Acacia agrees that interoperability between the Accused Products and the
 25 royalty-bearing products requires at least the first six of ViaSat's seven ATs. (D.I. 83,
 26 Mem. at 17). ViaSat tries to turn that into an admission of wrongdoing, claiming that
 27 "in its own recently filed summary judgment motion, Acacia effectively conceded that
 28 partial summary judgment on the misappropriation element of ViaSat's trade secret

claims should enter.” (D.I. 98, Mem. at 3). Acacia has conceded nothing of the kind. As Acacia explains in D.I. 83 and again below, Acacia’s activities relating to the ViaSat’s ATs are proper, for several reasons.

C. ViaSat Lacks Any Actual Evidence that the Accused Products Improperly Use any of ViaSat’s Old SDFEC Code.

It is undisputed that Acacia did **not** incorporate into the Accused Products **any** of the [REDACTED] that are part of the Licensed Materials. ViaSat has never asserted otherwise. (D.I. 83, Mem. at 6-7). The Agreement requires Acacia to do so for Acacia to owe ViaSat a royalty. (Ag. §§ 1(l), 4(a)-(b)). Lacking any evidence that the Accused Products are actually royalty-bearing products – because they are not – ViaSat pressed forward through months of expensive litigation. All that it has to show for it is a handful of documents (D.I. 98, Mem. at 1-21) that ViaSat characterizes in ways that are wrong, and very much disputed, as discussed below. To the extent these documents are relevant at all, their meanings and implications are disputed, so summary judgment for ViaSat would be error.

D. ViaSat’s Purported Evidence Does Not Amount to Breach of the Agreement or Trade Secret Misappropriation.

ViaSat cursorily presents three theories of liability in its motion. (D.I. 98, Mem. at 23-25). First, ViaSat alleges that Acacia made Licensed Products with Licensed Materials, necessitating payment of a royalty fee under Section 4(b). (*Id.* at 23). Second, ViaSat alleges that Acacia improperly used Background Information under Section 8(b). (*Id.*). Third, ViaSat alleges that Acacia misappropriated these general ideas on the theory that they are trade secrets. (*Id.* at 23-25).

ViaSat never attempts to explain how its “facts” prove that breach or misappropriation occurred. The sum total of ViaSat’s analysis is the conclusion that Acacia “used” Licensed Materials, Background Information, and ViaSat ATs when developing the Accused Products. (*Id.*). Unsupported conclusions cannot satisfy ViaSat’s burden. *See John M. Floyd & Assocs., Inc. v. TAPCO Credit Union*, 550 F. App’x 359, 360 (9th Cir. 2013) (holding party’s “unexplained belief” insufficient to meet its

burden on summary judgment where it lacked a “foundation to link” its theory with supporting evidence); *Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 279 (9th Cir. 1993) (affirming denial of summary judgment: “[U]nsupported conclusions are not facts sufficient to support either a summary or a post-trial judgment.”).

Although Acacia could oppose ViaSat’s motion on that basis alone, Acacia shows below why ViaSat’s unexplained conclusions are wrong. Acacia refers to its arguments in its motion for summary judgment of no liability (D.I. 83). Not only does ViaSat fail to establish a factual basis sufficient for judgment in its favor, but judgment on these issues should enter for Acacia.

The sections below address each type of “evidence” that ViaSat identifies in its motion and explains why Acacia’s purported “use” does not amount to breach of contract or trade secret misappropriation.

1. General Concepts That ViaSat Calls Its ATSS

ViaSat’s motion refers to several general concepts as its ATSS and asserts that its ATSS “are all part of the Background Information.” (D.I. 98 at 25). ViaSat initially identified nine ATSS – [REDACTED]

[REDACTED]. (Ex. 136 at 180:17-182:11). Later, ViaSat had to admit that its own marketing materials and public papers disclosed at least two of these ATSS, and so withdrew them from the case. (Ex. 101; *see also* D.I. 112).

For at least the following reasons, ViaSat has not proven that Acacia used these general concepts, or that it breached the contract or misappropriates them.

a. No Misuse of Background Information

ViaSat makes no attempt to prove that these ATSS are Background Information under the Agreement, and in fact, none are. As discussed above, Background Information is limited to information that ViaSat “owned,” “licensed,” or “developed” “prior to” or “separate from” the Agreement (Ag. § 1(b)), and the Agreement’s limits regarding Background Information concern only that which Acacia “receives from

VIASAT under the Agreement” (*id.* §§ 1(b), 8(b)). **Acacia** independently developed ATSS 1-3 and told ViaSat about them during the parties’ project. (D.I. 83, Mem. at 5-11). Similarly, at least ATS 1 and 3-7 were publicly known before the Agreement. (*Id.* at 11-22). Information that Acacia developed and told ViaSat, or that a third party developed, is not Background Information.

ViaSat similarly makes no attempt to show how Acacia’s purported use of these general concepts violates the Agreement’s limits on how Acacia may use Background Information. As discussed above, no section of the Agreement provides for a general prohibition on “use” of the Background Information.

Even assuming that Acacia’s purported use of the ATSS were outside some general limit on “use” of Background Information, Section 3(b)’s grant of a royalty-free license allows Acacia to make whatever such use of Background Information that Acacia may need in order to fully commercially exploit its Foreground Technology. Section 3(b), in other words, provides Acacia with a broad license to make backward-compatible products; and the parties agree that the Accused Products are backward-compatible. (D.I. 83, Mem. at 11-17). Hence ViaSat has not proven that Acacia’s purported use of its ATSS is a breach of contract.

b. No Trade Secret Misappropriation

ViaSat seeks judgment that “ViaSat has established the misappropriation element of its claim for misappropriation of trade secrets,” but then states that “the validity of those trade secrets and damages to be determined at trial.” (D.I. 98). Since “misappropriation” requires a trade secret (CAL. CIV. CODE § 3425.1(a)), the Court cannot enter judgment of misappropriation while ignoring whether ViaSat even has trade secret protection for these concepts at all. Acacia explained that ViaSat is not entitled to trade secret protection for any of its ATSS. (D.I. 93). For that reason alone, the Court should deny this part of ViaSat’s motion.

Even assuming that ViaSat’s motion seeks summary judgment that Acacia improperly used what is recited in those ATSS, regardless of whether they are trade

secrets, the motion still fails. The same Section 3(b) license that allows Acacia to use Background Information to make backward-compatible products also permits Acacia to use the ATSs. (D.I. 83, Mem. at 11-17). Section 3(b) applies to the ATSs as well.

ViaSat's blanket request for judgment is inappropriate for at least two more reasons. First, ViaSat has not proven that the Accused Products use ATSs 2 or 7 at all, or that the Accused Products use ATS 1 and 3 in non-backward-compatible modes. (D.I. 83, Mem. at 17-23). Second, ViaSat's trade secret rights ended when Acacia's non-disclosure obligations did (i.e., [REDACTED]). (D.I. 75 at 14-20).

c. No Misuse of Licensed Materials

The general concepts that ViaSat identified as its ATSs cannot be "Licensed Materials." (D.I. 83 at 9-11). Summary judgment that Acacia's purported use of the general concepts in ViaSat's ATSs is inappropriate.

2. Specifications That ViaSat Provided Under the Agreement

Throughout its motion, ViaSat leans heavily on the allegation that Acacia did something improper with the written specifications made under the Agreement. (*E.g.*, D.I. 98, Mem. at 4-5, 17-19). But ViaSat has not proven that Acacia misused them.

a. No Misuse of Background Information

ViaSat makes no attempt to show what, if anything, in the specifications is Background Information that Acacia "receive[d] from VIASAT under this Agreement," as is required for all of the Agreement's limits on the use of Background Information. (*E.g.*, Ag. § 8(a)). The snippets that ViaSat highlights in its opposition (D.I. 98 at 4) and in Exhibit 1 to its opposition involve concepts that **Acacia** created and told ViaSat, [REDACTED]. (D.I. 98, Ex. 1; D.I. 93, Mem. at 6-9). In recognition of Acacia's contributions to these specifications, their front pages all say they have "confidential and propriety information" and that **Acacia's** permission is required to disseminate them. (D.I. 98, Ex. 7 at 1; D.I. 98, Ex. 8 at 1).

ViaSat does not identify which provision(s) regarding Background Information Acacia could have violated. ViaSat harps on “copying” (*e.g.*, Memo. at 4), but as discussed in Section IV.A.2 above, the Agreement provides ViaSat with certain rights and not others, but does not have any general prohibition on “copying” of Background Information into another document. ViaSat does not show misuse of Background Information.

Further, as also discussed above in Section IV.D.1.a. regarding general concepts, even if Acacia’s purported use of the specifications were outside the limits on use of Background Information, ViaSat is licensed to use the specifications to make backward-compatible products. (D.I. 83-1 at 11-17). Therefore, ViaSat has not proven that Acacia’s purported “copying” from the specifications is a contract breach.

b. No Trade Secret Misappropriation

For all the reasons discussed in Section IV.D.1.b above regarding the general information that ViaSat calls its ATs, ViaSat similarly fails to show how purported “copying” of the specifications amounts to misappropriation.

c. No Misuse of Licensed Materials

Unable to show that Acacia’s Accused Products improperly incorporate any of its technology, ViaSat falls back on the argument that some of its written documentation about its products (the “specifications”) are Licensed Materials (D.I. 98, Mem. at 12), and that Acacia copied portions of those documents when generating its own specifications for its own products. But this is not a copyright case, and ViaSat never explains how Acacia’s purported “copying” of a specification could amount to making Licensed Products requiring a royalty. Rather, ViaSat only asserts that Acacia made the Accused Products “using” Licensed Materials – conflating actual products with the written documentation describing them. (*Id.* at 23). Even if ViaSat had shown that Acacia “used” ViaSat’s specifications “to make” the Accused Products – which it did not – the mere “use” of Licensed Materials to make another product does not turn that product into a royalty-bearing “Licensed Product.” (D.I. 83, Mem. at 7-

9). As discussed, that obligation was proposed but dropped from the final contract. (*Id.*). ViaSat's theory impermissibly "read[s] into an agreement a contract term that was expressly considered and rejected by the parties in the course of negotiations." *GRT, Inc. v. Marathon GTF Tech., Ltd.*, No. 5571, 2012 WL 2356489, at *7 (Del. Ch. June 21, 2012) (granting summary judgment on that ground).

3. [REDACTED] Encoder Source Code

In various places, ViaSat refers to "use" of the encoder source code. (*E.g.*, D.I. 98, Mem. at 5, 16-17). Such "use" does not amount to breach or misappropriation.

a. No Misuse of Background Information

ViaSat fails to show how Acacia's purported use of [REDACTED] encoder source code amounts to misuse of Background Information for the same reasons that ViaSat's argument fails with regard to general concepts (*see* Section IV.D.1.a above) and the specification (*see* Section IV.D.2.a above). ViaSat does not attempt to explain how Acacia's claimed use of the [REDACTED] encoder source code violates the Agreement's limits on what Acacia can do with Background Information. Acacia is licensed to use the [REDACTED] encoder source code, to the extent it is Background Information, to make backward-compatible products. (D.I. 83, Mem. at 11-17).

b. No Trade Secret Misappropriation

For all the reasons discussed in Section IV.D.1.b above regarding ViaSat's ATs, ViaSat similarly fails to show how purported "use" of the [REDACTED] encoder source code amounts to misappropriation.

c. No Misuse of Licensed Materials

As the Agreement is clear that "source code ... shall **not** be a Licensed Material" (Ag. § 1(k)), any purported use of the [REDACTED] encoder source code in a product cannot make that product royalty-bearing. ViaSat agrees, since it relies on that language. (D.I. 103 at 17). Thus, whatever Acacia did with the [REDACTED] encoder source code, it was unrestricted because that code was not Licensed Materials.

4. ViaSat's June 2009 "White Paper"

ViaSat dwells on a "White Paper" it sent Acacia. (*E.g.*, D.I. 98, Mem. at 5, 7-9, 12, 14-16, 22). For at least the following reasons, ViaSat has not proven that Acacia used that paper in a way that amounts to breach of contract or misappropriation.

a. No Misuse of Background Information

Yet again, ViaSat does not explain what, if anything, Acacia did with this "White Paper" that was improper. ViaSat acknowledges that it sent the "White Paper" to Acacia on June 12, 2009 – months before the parties signed the Agreement. (*Id.* at 7-8, 12). Consequently, the "White Paper" is not subject to the any of the limits associated with Background Information, which all concern information Acacia "receives from VIASAT under this Agreement." (*E.g.*, Ag. § 8(b)).

b. No Trade Secret Misappropriation

ViaSat does not claim, and has never claimed, that the "White Paper" disclosed any of its ATSS. ViaSat has only ever claimed that the "White Paper" contains a part of one of its ATSS ([REDACTED]). (D.I. 75, Ex. 10 at No. 23). Under California law, it is far too late to re-define its trade secrets now to encompass a different configuration not included in its Trade Secret Disclosure. CAL. CIV. CODE § 2019.210; *see also Computer Econs., Inc. v. Garnter Group, Inc.*, 50 F. Supp. 2d 980, 984 (S.D. Cal. 1999) (purpose of the statutory disclosure requirement is to streamline discovery, and to provide "reasonable notice of the issues which must be met at the time of trial"); *Pixion, Inc. v. PlaceWare Inc.*, 421 F. Supp. 2d 1233, 1242 (N.D. Cal. 2005) (holding that at trial and summary judgment, trade secrets should be evaluated "as pled"). Further, for all the reasons discussed in Section IV.D.1.b above regarding the general information that ViaSat calls its ATSS, ViaSat similarly fails to show how purported "use" of this document could amount to misappropriation.

c. No Misuse of Licensed Materials

The "White Paper" cannot be "Licensed Materials." The only documentation included in the definition of Licensed Materials is that which "VIASAT may provide

1 **under this Agreement.”** (Ag. § 1(k). The “White Paper” was not provided “under
2 this Agreement,” but before it. (D.I. 98, Mem. at 7-8, 12).

3 **5. All the Rest of ViaSat’s “Evidence” Is Just Distraction.**

4 Most of ViaSat’s memorandum provides a slanted characterization of evidence
5 that ViaSat hopes will cast Acacia in a negative light. Acacia contests ViaSat’s
6 characterizations of those facts. But for present purposes, what matters is that none
7 of that evidence shows that Acacia breached the Agreement or misappropriated any of
8 the ATs, as discussed above. ViaSat’s extensive discussion of its purported evidence,
9 almost to the exclusion of any application of the law and the Agreement to that
10 evidence, illustrates how ViaSat’s emphasis is more on optics than on applying the
11 facts, the Agreement, and the law. ViaSat also discusses certain other evidence
12 irrelevant to the parties’ motions, and which should thus be disregarded. Acacia
13 discusses a few of them below, only in the interest of completeness.

14 ViaSat faults one of Acacia’s founders for [REDACTED]
15 [REDACTED] (D.I. 98, Mem. at 5, 15). ViaSat claims the engineer [REDACTED]
16 [REDACTED] (*Id.* at 15). The fact
17 that this individual (who was testifying as a personal fact witness, not a Rule 30(b)(6)
18 corporate designee) could not [REDACTED]
19 [REDACTED] is of no legal import, and ViaSat does not show
20 otherwise. The witness answered as best he could; unsurprisingly he did not recall
21 [REDACTED]. (*E.g.*, D.I. 98, Ex. 16 at 113:13-23, 116:12-19). Again,
22 ViaSat does not even attempt to explain how anything this individual did constitutes
23 breach or misappropriation.

24 ViaSat claims that Acacia did not store Background Information in a restricted
25 directory. (D.I. 98, Mem. at 13). ViaSat claims that Acacia’s written explanation that it
26 did restrict access (D.I. 98, Ex. 50) is wrong, and ViaSat cites various excerpts of
27 Acacia deposition testimony. But all of the testimony that ViaSat cites indicates that
28 certain deponents of whom ViaSat asked the question [REDACTED]

1 [REDACTED]. ViaSat ignores the unequivocal, sworn testimony
 2 of [REDACTED] [REDACTED]
 3 [REDACTED]. (*See, e.g.*, Ex. 126 at 44:15-23; Ex. 115 at 38:15-39:3). ViaSat shows no
 4 breach or right to any remedy, especially given Acacia's interrogatory response
 5 regarding the extensive efforts taken by Acacia to maintain the confidentiality of
 6 ViaSat's alleged trade secrets. (Ex. 102 at No. 11).

7 Finally, ViaSat faults Acacia because some of its engineers were not aware of
 8 specific contractual provisions. (D.I. 98, Mem. at 16). However, the only evidence
 9 ViaSat cites shows that those engineers were [REDACTED]
 10 [REDACTED]. (D.I. 83, Mem. at 11-17). Their work did not
 11 exceed Acacia's authorization under the Agreement, and there is nothing untoward
 12 about a company's engineering staff being relatively unfamiliar with its legal
 13 documents.

14 **V. CONCLUSION**

15 For the above reasons, Acacia respectfully requests that the Court deny ViaSat's
 16 motion for partial summary judgment (D.I. 98).

17
 18 Date: February 16, 2018

Respectfully Submitted,

19 WOLF, GREENFIELD & SACKS, P.C.

20 By: s/Michael A. Albert

21 Michael A. Albert

22 Hunter D. Keeton

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24 Attorneys for Defendant and Counter
 25 Claimant Acacia Communications, Inc.

CERTIFICATE OF SERVICE

I certify that today I caused to be served the redacted version of the foregoing document by CM/ECF notice of electronic filing upon the parties and counsel registered as CM/ECF Users. I further certify that am causing the redacted and unredacted versions of the foregoing document to be served by electronic means via email upon counsel for ViaSat, Inc., per the agreement of counsel.

Date: February 16, 2018

s/Michael A. Albert

Michael A. Albert